Remarks

This Application has been carefully reviewed in light of the Office Action dated October 27, 2010. Prosecution has been reopened in light of the Notice of Panel Decision from Pre-Appeal Brief Panel Decision. Applicants appreciate the Examiner's consideration of the Application. Although Applicants believe all claims are allowable without amendment, to advance prosecution Applicants have made clarifying amendments to Claims 16-30. None of these amendments are made in relation to any reference cited by the Examiner. Applicants respectfully request reconsideration and allowance of all pending claims.

I. Claims 16-30 Recite Statutory Subject Matter

The Examiner rejects Claims 16-30 under 35 U.S.C. § 101 as being directed to non-statutory subject matter. Although Applicants believe the claims are directed to statutory subject matter as written, to advance prosecution Applicants have made clarifying amendments to Claims 16-30 to obviate these rejections. For at least these reasons, Applicants respectfully request reconsideration and allowance of Claims 16-30.

II. The Claims are Allowable over the Proposed *Brownell-Marsh-Lortz* Combination

The Examiner rejects Claims 1-45 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent 7,231,430 to Brownell et al. ("*Brownell*"), U.S. Patent 7,055,148 to Marsh et al. ("*Marsh*"), and U.S. Patent 7,28,583 to Lortz et al. ("*Lortz*"). Applicants respectfully traverse these rejections.

Respectfully, the Examiner has not demonstrated a *prima facie* case of obviousness for at least two reasons. First, the proposed *Brownell-Marsh-Lortz* combination fails to disclose, teach, or suggest each and every limitation recited in Applicants' independent claims. Second, the proposed *Brownell-Marsh-Lortz* combination is improper.

A. The Proposed *Brownell-Marsh-Lortz* Combination Fails to Disclose, Teach, or Suggest All Limitations of the Independent Claims

Independent Claim 1, which Applicants discuss as an example, recites the following:

> A method comprising:
> selecting a distributed application;
> retrieving a policy associated with the distributed application;

dynamically selecting one of a plurality of nodes;

resetting a boot image of the selected node based at least in part on the retrieved policy, the boot image being compatible with the distributed application;

associating a virtual disk image with the selected node based at least in part on the retrieved policy; and

executing at least a portion of the distributed application on the selected node, as reset, using the virtual disk image associated with the selected node, the execution performed by at least one processor of the selected node.

At a minimum, the proposed *Brownell-Marsh-Lortz* combination fails to disclose, teach, or suggest the following limitations recited in Claim 1:

- resetting a boot image of the selected node based at least in part on the retrieved policy [associated with the distributed application], the boot image being compatible with the distributed application; and
- associating a virtual disk image with the selected node based at least in part on the retrieved policy.

For example, the proposed combination fails to disclose, teach, or suggest "resetting a boot image of the selected node based at least in part on the retrieved policy" that is "associated with the distributed application," as recited in Claim 1. The Examiner apparently alleges that *Lortz* teaches the claimed retrieved policy associated with the distributed application. *See Office Action* at 6. The cited portion of *Lortz* primarily discloses a technique for translating a policy and distributing that policy to multiple clients. *See Lortz* at 3:50-5:45; *see also Office Action* at 6. In particular, *Lortz* discloses that "an older schema 130 associated with version '1.0' does not include the 'Rjindael' algorithm 94*b* of policy 30," and that "a network configurator associated with the older schema 130 cannot configure a network system using policy 30." *Lortz* at 3:50-55. *Lortz* discloses that "an XSL translation specification 36 (see also FIG. 1) may be used to translate policy 30 to an older version '1.0', which conforms to the older schema 130," and thus "the specification 36 directs a policy translator to translate a policy from version 1.1 to version 1.0." *See id.* at 3:56-4:3. According to *Lortz*, server 18 configures clients 12, 14, 16 by broadcasting (600 of FIG. 6) network policy 30 on network 10 so that policy 30 is received by all clients 12, 14, 16. *See id.* at 4:14-19. *Lortz* then discloses two techniques for configuring clients 12, 14, 16 -- one for clients that include a policy translator 70a and one for clients that do not include a policy translator.

However, while *Lortz* discloses a technique for distributing a policy, the cited portions of *Lortz* still fail to disclose, teach, or suggest the policy in *Lortz* being "**associated with the**

distributed application," as Claim 1 recites. Furthermore, the cited portions of *Lortz* fail to disclose, teach, or suggest that the policy in *Lortz* has anything to do with a boot image or a virtual disk image such that a boot image of a selected node could be reset based at least in part of the retrieved policy and that a virtual disk image could be associated with the selected node based at least in part of the retrieved policy, as would be required for the *Lortz* to even possibly disclose the retrieved policy of Claim 1.

The cited portions of *Brownell* and *Marsh* fail to cure this deficiency of *Lortz*. Notably, the Examiner admits that "*Brownell* is silent about resetting a boot image [read as configuring or re-configuring the boot file or registry file] of the selected node based at least in part on the retrieved policy and making the boot image being compatible with the distributed application." *Office Action* at 6. In addition, even assuming for the sake of argument that applying *Marsh*'s firmware patch could be considered "resetting a boot image" (which Applicants do not admit), *Marsh* would still not disclose, teach, or suggest a policy that is "associated with the distributed application," as Claim 1 recites. Thus, the proposed *Brownell-Marsh-Lortz* combination fails to disclose, teach, or suggest "resetting a boot image of the selected node based at least in part on the retrieved policy" that is "associated with the distributed application" as recited in Claim 1. Accordingly, the proposed *Brownell-Marsh-Lortz* combination fails to support the rejection of Claim 1.

As another example, the proposed *Brownell-Marsh-Lortz* combination fails to disclose, teach, or suggest "associating a virtual disk image with the selected node based at least in part on the retrieved policy," as recited in Claim 1. The Examiner relies on *Brownell* for this aspect of Claim 1. *Office Action* at 5-6. However, the cited portion of *Brownell* merely discloses a hardware platform that includes processing nodes connected to a switching fabric via a high-speed interconnect. *Brownell* at 2:56-67. Each processing node is a board that includes processors, network interface cards, and local memory that includes some BIOS firmware for booting and initialization. *Brownell* at 3:13-17. Control nodes connected to the switch fabric are each a single board that includes processors, local memory and local disk storage for holding independent copies of the boot image and initial file system that is used to boot OS software for the processing and control nodes. *Brownell* at 3:21-26. Even assuming for the sake of argument that the independent copies of the boot image and initial file system in *Brownell* could be considered a "boot image of the selected node" (which Applicants do

not admit), *Brownell* would still fail to disclose, teach, or suggest "dynamically selecting one of a plurality of nodes" and "associating a virtual disk image with the selected node," let alone doing so based on a retrieved policy as recited in Claim 1. *Marsh* and *Lortz* fail to cure this deficiency of *Brownell*. Accordingly, the proposed *Brownell-Marsh-Lortz* combination fails to support the rejection of Claim 1.

With respect to both of the above-discussed limitations, the rejection awkwardly breaks up the language of these limitations, relying on *Marsh* as allegedly disclosing "resetting a boot image of the selected node" and *Brownell* as allegedly disclosing "associating a virtual disk image with the selected node based," while relying on *Lortz* as allegedly disclosing "the retrieved policy." *See Office Action* at 5-6. It is unclear how the proposed combination could possibly disclose "resetting a boot image of the selected node **based at least in part on the retrieved policy**, the boot image being compatible with the distributed application" and "associating a virtual disk image with the selected node **based at least in part on the retrieved policy**," as recited in Claim 1, when the supposed retrieved policy is allegedly provided by a completely different reference from the references that supposedly disclose resetting the boot image and associating the virtual disk image.

Thus, the proposed *Brownell-Marsh-Lortz* combination fails to disclose, teach, or suggest each and every limitation of Claim 1. For at least these reasons, Applicants respectfully request the Examiner to reconsider and allow independent Claim 1 and its dependent claims.

Independent Claim 16 recites, in part, "reset[ting] a boot image of the selected node based at least in part on the retrieved policy [associated with the distributed application], the boot image being compatible with the distributed application" and "associate[ing] a virtual disk image with the selected node based at least in part on the retrieved policy." For at least certain reasons analogous to those discussed above with reference to independent Claim 1, the proposed *Brownell-Marsh-Lortz* combination fails to disclose, teach, or suggest, at a minimum, "reset[ting] a boot image of the selected node based at least in part on the retrieved policy [associated with the distributed application], the boot image being compatible with the distributed application" and "associate[ing] a virtual disk image with the selected node based at least in part on the retrieved policy," as recited in Claim 16. For at least these reasons,

Applicants respectfully request the Examiner to reconsider and allow independent Claim 16 and its dependent claims.

Independent Claim 31 recites, in part, "reset[ting] a boot image of the selected node based at least in part on the retrieved policy [associated with the distributed application], the boot image being compatible with the distributed application" and "associate[ing] a virtual disk image with the selected node based at least in part on the retrieved policy." For at least certain reasons analogous to those discussed above with reference to independent Claim 1, the proposed *Brownell-Marsh-Lortz* combination fails to disclose, teach, or suggest, at a minimum, "reset[ting] a boot image of the selected node based at least in part on the retrieved policy [associated with the distributed application], the boot image being compatible with the distributed application" and "associate[ing] a virtual disk image with the selected node based at least in part on the retrieved policy," as recited in Claim 31. For at least these reasons, Applicants respectfully request the Examiner to reconsider and allow independent Claim 31 and its dependent claims.

B. The Proposed *Brownell-Marsh-Lortz* Combination is Improper

First, the combination is improper because the proposed modification in view of *Marsh* would render at least *Brownell* unsatisfactory for its intended purpose.[1] An intended purpose of *Brownell* is to provide a control node that assists in deploying virtualized processing area networks. *Brownell* at 3:4-8. To achieve this purpose, *Brownell* permits communication from the control node but restricts communication between processing nodes. *Brownell* at 4:51-55. Specifically, "management logic and the control node logic are responsible for establishing, managing and destroying communication paths. The individual processing nodes are **not permitted** to establish such paths." *Id.* (emphasis added).[2] Thus, *Brownell* explicitly restricts processing nodes from establishing communication paths.

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[1] "If [the] proposed modification would render the prior art invention being modified **unsatisfactory for its intended purpose**, then there is **no suggestion or motivation to make the proposed modification.**" M.P.E.P. § 2143.01 (emphasis added); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416, 127 S.Ct. 1727, 1740 (when the prior art teaches away from combining certain known elements, discovery of a successful means of combining them is more likely to be nonobvious). "A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead way from the claimed invention." M.P.E.P. § 2141.02(VI).

[2] *Brownell* further states that "by having communication paths managed and created centrally (**instead of via the processing nodes**) such a **path is not creatable by the processing nodes**, and the defined subnet connectivity cannot be violated by a processor." *Brownell* at 5:39-45.

In contrast, the cited portion of *Marsh* discloses a "ring configuration" of network nodes and emphasizes that the ring configuration provides bi-directional communication between the network nodes, which permits a firmware patch to be distributed to networked computer systems. *Marsh* at 8:35–9:23 and Fig. 5. The Examiner seems to propose modifying *Brownell* to permit distribution of the firmware patch between network nodes, as described in *Marsh*. *Office Action* at 6. However, modifying the processing nodes in *Brownell* to distribute a firmware patch among one another would render *Brownell* unsatisfactory for its intended purpose, as it would require establishing communication paths between *Brownell's* processing nodes, defeating *Brownell's* purpose of restricting communication paths between processing nodes. *Brownell* at 4:51-55.

Thus, the proposed modifications in view of *Marsh* would render at least *Brownell* unsatisfactory for its intended purpose. Consequently, the proposed combination and resulting rejections are improper.

Second, the combination is improper because the proposed modifications in view of *Marsh* would impermissibly change the principle of operation of at least *Brownell*.[3] For example, modifying the processing nodes in *Brownell* to distribute a firmware patch among one another (per *Marsh*) would require establishing communication paths between those processing nodes, destroying the principle of operation in *Brownell* of restricting communication paths between processing nodes. *Brownell* at 4:51-55. Because the proposed modification in view of *Marsh* would destroy the principle of operation of at least *Brownell*, the proposed combination and resulting rejections are improper.

Third, the proposed *Brownell-Marsh-Lortz* combination is improper because it results from improper hindsight reconstruction of Applicants' claims.[4] In attempting to locate the limitations of Claim 1, for example, in the alleged prior art, the Examiner has cited disjointed portions of three different references. For example, the claimed "selected distributed

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[3] "If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious." M.P.E.P. § 2143.01.

[4] "Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418, 127 S. Ct. 1727, 1741, 82 U.S.P.Q.2d 1385, 1396 (2007) (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

application" allegedly is found in *Brownell*, the claimed "policy associated with the distributed application" allegedly is found in *Lortz*, and the claimed resetting of the boot image (which, as claimed, is "based at least in part on the retrieved policy," allegedly found in *Lortz*) allegedly comes from *Marsh*. Yet, the Examiner provides only conclusory assertions for piecing together these disjointed alleged teachings of the three references in attempting to reconstruct Claim 1. Applicants submit that the Examiner's attempt to combine *Brownell*, *Marsh*, and *Lortz* constitutes a classic case of impermissible hindsight reconstruction of Applicants' claims, using Applicants' claims as a blueprint, that is specifically prohibited by the M.P.E.P. and governing Federal Circuit cases, as can be seen by the disjointed mapping of the references' alleged teachings to the limitations of Claim 1.

For at least these additional reasons, Applicants respectfully request the Examiner to reconsider and allow independent Claims 1, 16, and 31 and all their dependent claims.

III. Request for Evidentiary Support

Should a rejection based on any of the above asserted rejections be maintained, Applicants respectfully request appropriate evidentiary support. Additionally, if the Examiner is relying upon "common knowledge" or "well known" principles to establish the rejection, Applicants request that a reference be provided in support of this position pursuant to M.P.E.P. § 2144.03. Furthermore, to the extent that the Examiner maintains any rejection based on an "Official Notice" or other information within the Examiner's personal knowledge, Applicants respectfully request that the Examiner cite a reference as documentary evidence in support of this position or provide an affidavit in accordance with M.P.E.P. § 2144.03 and 37 C.F.R. 1.104(d)(2).

IV. No Waiver

All of Applicants' arguments and amendments are without prejudice or disclaimer. Applicants reserve the right to discuss the distinctions between the applied art and the claims in a later Response or on Appeal, if appropriate. By not responding to additional statements made by the Examiner, Applicants do not acquiesce to the Examiner's additional statements. The example distinctions discussed by Applicants are sufficient to overcome the Examiner's rejections.

Conclusion

Applicants have made an earnest attempt to place this case in condition for allowance. For at least the foregoing reasons, Applicants respectfully request full allowance of all pending claims.

If the Examiner feels that a telephone conference or an interview would advance prosecution of this Application in any manner, the Examiner is invited to contact Chad D. Terrell, Attorney for Applicants, at (214) 953-6813 at the Examiner's convenience.

Although Applicants believe no fees are due at this time, the Commissioner is hereby authorized to charge any additional necessary fees and credit any overpayments to Deposit Account No. 02-0384 of Baker Botts LLP.

Respectfully submitted,

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